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No. 17

# In the Supreme Court of the United States

OCTOBER TERM, 1952

KWONG HAI CHEW, PETITIONER

*v.*

CAPTAIN SVEND COLDING, MASTER OF THE SS "SIR JOHN FRANKLIN," AND EDWARD J. SHAUGHNESSY, DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION AT THE PORT OF NEW YORK

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE RESPONDENT SHAUGHNESSY

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## BRIEF FOR THE RESPONDENT SHAUGHNESSY

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### OPINIONS BELOW

The opinion of the District Court (R. 39-45) is reported at 97 F. Supp. 592.[1] The opinion of the Court of Appeals (R. 51-53) is reported at 192 F. 2d 1009.

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[1] A later opinion of the District Court, denying petitioner's release on bail pending an appeal, is reported at 98 F. Supp. 717.

## JURISDICTION

The judgment of the Court of Appeals was entered on December 4, 1951 (R. 54). The petition for a writ of certiorari was filed on February 28, 1952, and was granted on April 28, 1952 (R. 55). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether an alien, who has been legally domiciled in the United States and who is returning to the United States from a round-trip voyage to foreign ports as a seaman on an American merchant vessel, may be denied entry during a period of national emergency without a hearing on the basis of confidential information that his entry would be prejudicial to the public interest.

## STATUTES, PROCLAMATIONS, AND REGULATIONS INVOLVED

The statutes, Presidential Proclamations, and regulations involved are set forth in the Appendix, *infra*, pp. 40-52.

## STATEMENT

Petitioner, a Chinese national (R. 8, 30), who had previously been admitted to the United States on several occasions as a seaman, was last admitted to this country on January 10, 1945 (R. 17). He apparently overstayed his shore leave, and on June 22, 1946, he married a native-born American citizen (R. 5, 17, 18, 34). On the basis of this marriage, petitioner applied, in 1949, for suspension of deportation in accordance with the provisions of Section 19(c) of the Immigration Act of 1917, as amended (39 Stat. 874, 889; 54 Stat. 670, 671; 56

Stat. 1044; 62 Stat. 1206; 8 U.S.C., Supp. V, 155(c)).[2] Pursuant to the procedures established under that statute, the application was granted, approved by Congress (63 Stat. 1240), and his admission for permanent residence was recorded as of the date of his last entry. (R. 4, 17-18, 33.) On April 6, 1950, he filed a petition for naturalization, which is presently pending (R. 4, 13, 21-22, 35). In November 1950, petitioner was screened and passed by the Coast Guard for employment as a seaman on a foreign voyage. He left the United States on November 18, 1950, as chief steward on the *SS Sir John Franklin,* of the Isbrandtsen Line, which called at a number of ports in Egypt and the Far East (R. 5, 19-20, 23, 34).[3] On March

[2] "(c) in the case of any alien * * * who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may * * * (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; * * * If the deportation of any alien is suspended under the provisions of this subsection for more than six months, a complete and detailed statement of the facts and pertinent provisions of law in the case shall be reported to the Congress with the reasons for such suspension. * * * If during the session of the Congress at which a case is reported, or prior to the close of the session of the Congress next following the session at which a case is reported, the Congress passes a concurrent resolution stating in substance that it favors the suspension of such deportation, the Attorney General shall cancel deportation proceedings. * * *"

[3] Petitioner testified that he remained aboard ship on this foreign voyage (R. 19). Whether that testimony means that he was continuously attached to the ship throughout the voyage or that he did not step ashore, even temporarily, at any of its stops is not clear. In any event it is immaterial.

10, 1951, the *Franklin* returned to this country, stopping first at San Francisco, California. There, the examining immigrant inspector, on the basis of confidential information that petitioner's entry would be prejudicial to the public interest, temporarily excluded him under the authority of Section 175.57, Title 8 C.F.R. (1949 ed.), *infra*, pp. 50-52. Respondent Colding, as master of the *Franklin*, was thereupon served with an order to detain petitioner on board at all American ports. (R. 8, 21, 23, 30-31.) The vessel then proceeded to Los Angeles, California, and thence to New York, arriving there on March 29, 1951, where the temporary exclusion order was continued in effect. The following day, a new order to detain petitioner on board at all United States ports was served on the master. (R. 4, 9, 31.)

On March 30, 1951, petitioner, through his attorney, filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of New York against respondent Colding, respondent Shaughnessy, as District Director of Immigration and Naturalization at the port of New York, and others, charging that petitioner's detention was in violation of the due process clause of the Fifth Amendment. The writ issued (R. 2-3), and a return was filed (R. 8-9), reciting the basis of petitioner's temporary exclusion and stating that a decision by the Attorney General was awaited as to whether the exclusion order would be made permanent. Following the filing of a traverse (R. 10-11), the cause came on for hearing

before the District Court, with petitioner as the sole witness (R. 12, 17-23). The court reserved judgment, pending the Attorney General's determination (R. 24, 27), and it was stipulated that petitioner might resail on the *Franklin* without rendering the cause moot (R. 26-28).

On April 19, 1951, an amended return was filed (R. 30-32), stating that the Acting Attorney General had ordered that petitioner be denied a hearing before a board of special inquiry and that he be excluded pursuant to 8 C.F.R. 175.57, *infra*, pp. 50-52. The amended return also stated that petitioner had been transferred to Ellis Island for detention on behalf of respondent Colding. The amended traverse (R. 33-38) alleged that the Coast Guard had denied petitioner permission to sail and that, on information and belief, the denial was solely because of the immigration proceeding pending against him (R. 34).

Without further hearing, the District Court, on the authority of *Knauff* v. *Shaughnessy*, 338 U.S. 537, entered judgment on May 21, 1951 (R. 46), dismissing the writ of habeas corpus and remanding petitioner to the custody of respondents. The judgment was affirmed by the Court of Appeals for the Second Circuit (R. 54, 51-53).

## SUMMARY OF ARGUMENT

There is involved in this case the validity of the action of the Attorney General in denying entry to an alien without a hearing, the same action under the same authority that was upheld by this Court in

*Knauff* v. *Shaughnessy*, 338 U.S. 537. The law involved is the Passport Act of May 22, 1918, as amended in 1941, and retained in effect to cover the present emergency (22 U.S.C. 223-227). In brief, the Act authorizes the President to prohibit or restrain the departure and entry of aliens and to require the use of passports by citizens during times of war or national crisis. The Act was designed to give protection against espionage, sabotage, and subversion rather than to carry out long-term immigration policy. The regulations provide that an alien shall be excluded when it appears to the Attorney General that his entry would be prejudicial to the interests of the United States within the scope of certain specific regulations. In special cases exclusion of the alien may be ordered without a hearing when the order is based on information of a confidential nature the disclosure of which would be prejudicial to the public interest. As in the *Knauff* case, the Attorney General considered that this was such a case and entered his order without a hearing.

The decision in the *Knauff* case authoritatively answers any question as to the constitutionality of the statute or the validity of the regulations as applied to the facts of that case. The only remaining questions in this case are whether the law and regulations authorize the exclusion of an alien who has established residence in this country lawfully, and has left the country only temporarily as a seaman on a round-trip voyage and, if such an entry is

covered, whether the law as so applied is constitutional.

I

Apparently the petitioner believes that the Passport Act should be interpreted to authorize the Attorney General to exclude "immigrants" such as Mrs. Knauff but not to deny reentry to resident aliens such as petitioner (Pet. Br. 28-30). By its terms the Act applies to every departure and entry by an alien and therefore is as applicable to a reentry as to an original coming. In other statutes and other contexts the word "entry" has been uniformly interpreted to cover the return of a resident alien. This interpretation has been adopted with respect to both exclusion and deportation proceedings and even though it has subjected persons who have established deep roots in our society to a forced return to their native lands. *Lapina* v. *Williams*, 232 U.S. 78; *Lewis* v. *Frick*, 233 U.S. 291; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422; *United States ex rel. Claussen* v. *Day*, 279 U.S. 398; *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129.

The only reason for giving the word "entry" or the word "alien" a different meaning in the present statute would be if the usual meaning were inconsistent with the purposes of the Passport Act. However, in view of the fact that the Act is a security measure designed to control the coming and going of persons who may be engaged in activities dangerous to our safety, there is more reason for giving the words their accepted meaning here than

there was with respect to the immigration laws as to which they have been previously interpreted. Moreover, the general structure of the statute and its legislative history confirms that it was intended to apply to such situations as the present one.

Petitioner's reference to the provisions of the Nationality Act, which constitute service on an American vessel part of the residence required for naturalization, is inapposite. The continuation of residence is strictly limited to the statute in which it appears and can in no way be construed to have any effect on a determination of whether or not the return of this petitioner constituted an entry.

The Act requires that the rules and regulations adopted thereunder be "reasonable." As applied to the facts in *Knauff* v. *Shaughnessy*, 338 U.S. 537, the regulation here in question was found reasonable even though under it the alien had been denied a hearing. Its application to the present case is even more necessary, and therefore reasonable, since the danger of espionage and subversion is even greater with respect to a roving alien such as petitioner, while the necessity of protecting the source of information is equally great.

II.

The only question remaining is whether the exclusion of this alien was in violation of due process even though this Court has held that Mrs. Knauff was not denied due process. In the *Knauff* case even the dissenting justices did not base their disagreement upon lack of power in Congress, but rather upon a construction of the War Brides Act.

It has been established in a large number of cases that an alien applying for entry may be excluded under such procedures as seem appropriate to Congress. *Nishimura Ekiu* v. *United States*, 142 U.S. 651; *The Chinese Exclusion Case*, 130 U.S. 581. It has also been held that aliens resident in this country are entitled to a fair hearing before they are deported. *Fong Yue Ting* v. *United States*, 149 U.S. 698; *The Japanese Immigrant Case*, 189 U.S. 86. Therefore, the question at issue is whether a resident alien who has voluntarily left the country and now seeks to return is in the position of an immigrant alien seeking admittance or of a resident alien being deported. The cases are unanimous in treating such an alien in exactly the same light as an immigrant and these cases involve problems of procedural due process as well as the substantive right of exclusion. *The Chinese Exclusion Case*, 130 U.S. 581; *Lem Moon Sing* v. *United States*, 158 U.S. 538. They make it clear that the constitutional rights of the resident alien are wholly dependent upon his physical presence within the country which he necessarily surrenders when he elects to leave the country. The facts that this particular alien has applied for citizenship, has been screened by the Coast Guard, and made his voyage as a seaman on a American-owned vessel add nothing to his constitutional rights.

The argument that the Due Process Clause has not been violated is buttressed by the fact that the right to exclude without a hearing is limited to times of emergency and then only when the Attorney General finds that the interests of the United

States would be prejudiced by disclosure of the confidential information on which the exclusion is based. Any claim of absence of due process must be considered in the light of the paramount interest of protecting the national security. *Ludecke* v. *Watkins*, 335 U.S. 160; *Korematsu* v. *United States*, 323 U.S. 214; *Hamilton* v. *Kentucky Distilleries Co.*, 251 U.S. 146.

If the fate of this petitioner seems an unhappy one, it must be borne in mind that so long as he remained an alien his continued stay in the country was on sufferance, and that it was his own voluntary choice to leave the comparative safety of our shores with the risk that he might not be readmitted.

## ARGUMENT

In periods of international emergency Congress has specifically authorized the President to impose additional restrictions and prohibitions on the departure from and entry into the United States of all persons, whether citizens or aliens. This authorization was originally enacted in the so-called Passport Act of May 22, 1918, 40 Stat. 559, and was effective only while the United States was at war. In 1941, after war had broken out in Europe but before the United States had become formally engaged, this Act was amended to make it applicable to the then existing emergency and, as to aliens, whenever a state of war should exist anywhere in the world. 55 Stat. 252; 22 U.S.C. 223-227. See Appendix, *infra*, p. 40. This Act, as so amended, has been continued in effect to the present

time (66 Stat. 54; 66 Stat. 96; 66 Stat. 137; and 66 Stat. 330; see Appendix, *infra*, pp. 40-43) and has been made permanent as to any future emergency declared by the President by Section 215 of the recently enacted Immigration and Nationality Act of 1952. Public Law 414, 82d Cong., 2d Sess. (Appendix, *infra*, p. 43).[4] The Passport Act is something separate and apart from the general provisions of the Immigration Law which specify the classes of aliens who shall be refused entry. (8 U.S.C. 136-137; Immigration and Nationality Act of 1952, Public Law 414, 82d Cong., 2d Sess., Sec. 212.)[5] It was pursuant to the Passport Act, as amended, that the petitioner was excluded.

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[4] The most recent extension of the Passport Act contained in Public Law No. 450 (66 Stat. 330) continued it in effect to "six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2914, 3 C.F.R., 1950 Supp., p. 71), or until such earlier date * * * as may be provided by the Congress * * * but in no event beyond April 1, 1953, * * *." Since Public Law 450 was enacted a few days after Public Law No. 414, which by its terms becomes effective on December 24, 1952 (Public Law 414, Sec. 403(a)(15)) it is not clear whether the effectiveness of the 1918 Act, as amended, will continue to December 24, 1952 or to April 1, 1953. This is immaterial to the present case since the authority granted the President is the same under the two laws.

[5] Section 22 of the Internal Security Act of 1950 (8 U.S.C. Supp. V, 137-4), amended the Immigration Law to provide for the exclusion of subversive aliens without a hearing "on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest, safety, or security." The exclusion of the petitioner in the present case was not effected under this section since there has been no finding that petitioner was a member of the class of aliens covered by that section. It should be noted that Section 22 of the Internal Security Act has been reenacted as Section 235(c) of the Immigration and Nationality Act of 1952. (Pub. Law 414, 82d Cong., 2d Sess.)

Section 1(a) of the Passport Act provides that during periods of war and the present emergency and when "the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, unless otherwise ordered by the President or Congress, be unlawful—(a) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe; * * *." (Appendix, *infra*, pp. 40; 42-43.)

Pursuant to the authority thus conferred upon him the President, on November 14, 1941, by Proclamation No. 2523 (Appendix, *infra*, pp. 44-46) forbade aliens to enter unless they held entry permits,[6] and further ordered that "no alien shall be permitted to enter the United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulation hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General." This proclamation was later amended among other things to vest the discretion

[6] No issue is raised in this case with respect to whether or not the petitioner had an entry permit. Presumably as a member of the crew of an American vessel he was covered by a crew list visa. (8 C.F.R. 177.55.)

to deny entry in appropriate cases in the Attorney General (Proc. No. 2850, Appendix, *infra*, pp. 46-47). The amended proclamation also ratified and confirmed all existing regulations under the earlier proclamation.

Acting pursuant to the above proclamations, the Secretary of State and the Attorney General jointly issued regulations which now appear in 8 C.F.R. (1949 ed) Part 175, pertinent portions of which appear in the Appendix, *infra*, pp. 47-52. Section 175.53 of the regulations (Appendix, *infra*, pp. 48-50) defines eleven categories of aliens whose entry is "deemed to be prejudicial to the interests of the United States". The activities covered in the definition may be roughly classified as including espionage, sabotage, and subversion. Section 175.57 of the Regulations (*infra*, pp. 50-52) provides that "any alien, even though in possession of a permit to enter, * * * may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable" under one of those categories; that "any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be prejudicial to the interests of the United States"; that, where an official of the Department of Justice temporarily excludes an alien on the ground that he is or may be excludable under one or more of the eleven categories, "no hearing

by a board of special inquiry shall be held until after the case is reported to the Attorney General and such a hearing is directed by the Attorney General"; and that "In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in Section 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest."[7]

In the present case the immigration officials first excluded the petitioner temporarily and then the Attorney General made his temporary exclusion permanent on the basis of the above regulation (R. 41). It is the legality of this action which is in question.

In *Knauff* v. *Shaughnessy*, 338 U. S. 537, this Court upheld the validity of the statute and regulation here involved as applied to an alien war bride. Even the dissenters based their disagreement not upon any lack of authority in Congress to authorize the regulation in question, but rather upon the theory that, with respect to the particular alien involved, the War Brides Act resulted in an exception from the general power of exclusion. Outside the fact that this petitioner is not

[7] In the ordinary case an alien whose right to enter is questioned is given a hearing before a board of special inquiry with the right to appeal to the Attorney General from an adverse decision (8 U.S.C. Supp. V, 152 and 8 U.S.C. 153, *infra*, pp. 51-52). This right to a hearing is included in the Immigration and Nationality Act of 1952, Pub. Law 414, Secs. 235-236.

a war bride, there are two factual differences between this case and the *Knauff* case. First, the petitioner had previously established a legal residence in this country, had filed a petition for naturalization which was still pending, and had not surrendered his domicile in this country, when he departed temporarily on a round-trip voyage to foreign ports. The petitioner argues that his residence here gives him rights not possessed by an immigrant approaching our shores for the first time. Second, the petitioner, while outside the geographic limits of the United States, was at all times attached to an American merchant vessel as a member of the crew. The petitioner suggests that the fact that Section 307(d)(2) of the Nationality Act of 1940 provides that time spent on an American merchant ship shall be added to the time of actual residence within the United States for naturalization purposes has some effect in determining whether he was making an entry into the United States under the provisions of the Passport Act. It is necessary to determine whether these factual differences between this case and the *Knauff* case require a different conclusion from that reached either with respect to the construction or constitutionality of the Act and Regulations.

## I

### The Refusal To Permit the Petitioner To Enter Was Authorized Under the Statute and the Regulations

The language of the statute, "it shall * * * be unlawful (a) for any alien to depart from or enter

* * * the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe," certainly specifically covers the petitioner. It is admitted that he is an alien, even though he has resided in this country and has petitioned for citizenship (Pet. Br. 2-3). It is also admitted that he is entering the United States on a return from foreign ports (Pet. Br. 3). Similarly, the language of the President's proclamation and the regulations is literally applicable to the petitioner, since it applies to all aliens, whether they are immigrants or residents, and to any entry by them. Therefore, petitioner can hope to support his argument that his particular status takes him out of the statute and regulations only by giving to the terms of the statute and regulations a restricted construction not apparent on their face. The only other escape is to find that the regulations are not "reasonable", in spite of the fact that they were upheld in the *Knauff* case. Neither of these arguments is tenable.

A. *The fact that petitioner is an alien who has been legally domiciled in the United States and is returning after a brief round-trip to foreign ports on an American vessel does not remove him from the classification of "any alien" "entering" the United States.*

1. Unless there is inherent in the structure of the law or its legislative history some reason to believe that its language is to be given a peculiar construction, it must be assumed that Congress, in

the statute, and the President, the Secretary of State, and the Attorney General, in the proclamation and regulations, used language in the sense in which it had previously been used in the immigration and naturalization laws. A long line of cases extending back to *Lapina* v. *Williams*, 232 U. S. 78, has consistently held that an alien is entering the country in situations where he has previously resided here and is returning after a brief visit abroad. The *Lapina* case involved the application of Section 3 of the Immigration Act of 1907 (34 Stat. 898) providing for the deportation of any alien woman found engaged in prostitution within three years after entering the United States. The Court held the provision applied to an alien who has resided in this country for ten years and then made a brief visit to Russia. This Court specifically rejected the argument that the statute should be applied only to immigrant aliens. Later, in the same term of the Court, this contention was again squarely rejected in *Lewis* v. *Frick*, 233 U. S. 291, where the resident alien merely crossed the river from Detroit to Windsor, Canada, and reentered the same day with an alien woman who was not his wife. The Court stated, at page 297:

> We hold, therefore, that the fact that the petitioner, Lewis, had been domiciled for six years or more in this country, he remaining still an alien, did not change his status so as to exempt him from the operation of the Immigration Act; and that if he departed from the country, even for a brief space of time, and

on reentering brought into the country a woman for the purpose of prostitution or other immoral purpose, *he subjected himself to the operation of the clauses of the Act that relate to the exclusion and deportation of aliens, the same as if he had had no previous residence or domicile in this country.* In short, the period of three years from entry prescribed by sections twenty and twenty-one, runs not from the date when the alien first entered the country, but from the time of the prohibited entry; that is to say, in the present case, the entry made by the alien when bringing in the woman.

In *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, it was held that a resident alien's return to the United States from a brief visit to Cuba, after conviction of a crime involving moral turpitude, constituted an "entry", for the purpose of the provision of Section 19 of the Immigration Act of 1917 for deportation for such a crime committed prior to entry. The court said (p. 425) "That the second coming of an alien from a foreign country into the United States is an entry within the usual acceptation of that word is clear enough from *Lewis* v. *Frick*, 233 U. S. 291; *Claussen* v. *Day*, 279 U. S. 398." See also *Hansen* v. *Haff*, 291 U. S. 559; *United States ex rel. Polymeris* v. *Trudell*, 284 U. S. 279; *Hamburg-American Line* v. *United States*, 291 U. S. 420.

Specifically, with respect to seamen on American ships, this Court held that a return to this country from a voyage on an American ship to a foreign

port is an entry within the meaning of the Immigration laws.

In *United States ex rel. Claussen* v. *Day*, 279 U.S. 398, the Court held that under Section 19 of the Immigration Act of 1917, 39 Stat. 889, providing for the deportation of any alien convicted of a crime involving moral turpitude, committed within five years after entry, the five-year period ran from the alien's return to this country from a trip as a seaman on an American merchant ship. In *United States ex rel. Stapf* v. *Corsi*, 287 U.S. 129, it was held that the return to this country of an alien seaman who had shipped on an American vessel which stayed in Germany for two and a half days constituted an entry. The evidence did not show whether he went ashore while there. In that case the alien was deported as an alien who had overstayed the permitted period pursuant to Section 14 of the Immigration Act of 1924 (43 Stat. 153, 162). Except for the new illegal entry based upon his return from Germany, the period of limitation contained in the earlier Immigration Act of 1917 would have barred deportation on the ground of his original illegal entry. In holding that the word "entry" had the same meaning in the 1924 act as in the 1917 act, the court said that the decision in the *Claussen* case "as to what constitutes an entry is equally conclusive in construing other sections of the immigration law" (p. 132).[8]

[8] In the recent case of *Delgadillo* v. *Carmichael*, 332 U.S. 388, this Court, in holding that there was no reentry when the alien's departure to the foreign port or place was involuntary or unwitting, recognized the principles established by the court's prior decisions.

Thus, the decisions of this Court had, prior to the enactment of the 1941 amendment involved in the instant case, firmly established that every return of an alien to the United States, from a voluntary departure to a foreign port or place, constitutes an "entry" for the purposes of the immigration laws, regardless of the legality or duration of the alien's residence or domicile in this country, and regardless of the duration of the alien's stay abroad.

More specifically, it was well established at the time of the 1941 amendment to the Passport Act that an entry, such as petitioner made into the United States, upon returning from a visit to a foreign port as an American seaman was an entry within the meaning of the immigration laws.[9]

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[9] The lower courts, following *Claussen* v. *Day*, have consistently held an entry to have occurred where an alien seaman returns from a voyage to foreign ports. *United States ex rel. Lehtola* v. *Magie*, 47 F. 2d 768 (D. Minn.); *Schmucker* v. *Martinez*, 37 F. 2d 315 (C.A. 4); *United States ex rel. Bardakos* v. *Mudd*, 33 F. 2d 334 (D. Md.). The same concept of "entry" has been consistently applied by the lower federal courts to the departure and return of aliens other than seamen, no matter how brief the visit. See, *e.g.*, *Del Guercio* v. *Gabot*, 161 F. 2d 559, 561 (C.A. 9) (four-hour visit to Mexico); *Guarneri* v. *Kessler*, 98 F. 2d 580 (C.A. 5), certiorari denied, 305 U.S. 648 (two or three-day visit to Cuba); *Jackson* v. *Zurbrick*, 59 F. 2d 937 (C.A. 6) (few hours' visit to Canada); *Cahan* v. *Carr*, 47 F. 2d 604, 605 (C.A. 9), certiorari denied, 283 U.S. 862 (one-day visit to Mexico); *United States ex rel. Natali* v. *Day*, 45 F. 2d 112, 113 (C.A. 2) (two-day visit to Canada); *United States ex rel. Medich* v. *Burmaster*, 24 F. 2d 57, 58 (C.A. 8) (alien taxi driver taking passenger to Canada and returning same day); *United States ex rel. Drachmos* v. *Hughes*, 26 F. Supp. 192 (D. N.J.), affirmed, 110 F. 2d 662 (C.A. 3) (overnight visit to Canada); *United States ex rel. Siegel* v. *Reimer*, 23 F. Supp. 643 (S.D. N.Y.), affirmed, 97 F. 2d 1020 (C.A. 2) (two-day visit to Canada); *Ex parte*

Certainly Congress intended the term "entry" to carry as broad a meaning in the emergency legislation of 1941 as that of the normal immigration laws.[10]

2. The structure and purpose of the Passport Act confirms the assumption that it was intended to apply to resident aliens reentering the country.

In structure, the Act is not even limited to aliens, but in Section 2 deals with the departure and entry of citizens, requiring that they carry passports. (22 U.S.C. 224). It would be strange if the Act were intended to deal with immigrant aliens and with citizens but not with the in-between class, resident aliens. Moreover, it is not lacking in sig-

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*Tatsuo Saiki*, 49 F. 2d 469 (W.D. Wash) (vessel on which alien, a passenger from Seattle to Alaska, makes 10 hours stopover at Canadian port; alien remaining aboard); *United States ex rel: Lehtola* v. *Maggi*, 47 F. 2d 768 (D. Minn.) (alien seaman on Great Lakes taking shore leave at Canadian port); *United States ex rel. Kowalenski* v. *Flynn*, 17 F. 2d 524 (W.D. N.Y.) (one-day picnic in Canada); *United States ex rel. Patricola* v. *Karnuth*, 9 F. Supp. 961 W.D. N.Y.) (few hours visit to Canada); *United States ex rel. Ueberall* v. *Williams*, 187 Fed. 470 (S.D. N.Y.) (one-hour visit to Canadian side of Niagara Falls).

[10] The new Immigration and Nationality Act of 1952, Public Law 414, 82d Cong., 2d sess., effective December 24, 1952, contains not only the normal immigration provisions but also the Passport Act. It makes it clear that in the future the Passport Act will cover reentries by resident aliens. Section 101(a) provides: "As used in this Act—* * * (13) The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary."

nificance that the terms of Section 1(a) of the Act, the section here under consideration, when referring to aliens, deal with the "*departure*" and "*entry*" of aliens in that order. Certainly, immigrant aliens do not depart from the United States before they enter. The statute must have referred to resident aliens who are the only ones to whom the provisions with respect to departure apply.

But even more significant than the internal indicia of intent, is the general purpose of the Act. There can be no doubt that the entire impact of the law was intended to focus on comings and goings, not on immigration in the sense of individuals moving their homes from one place to another. Thus, Senator Van Nuys, who was Chairman of the Judiciary Committee and in charge of the 1941 Act amending the law, stated in the Senate (87 Cong. Rec. 5386):

> I am revealing no state secret, but I am supported by the Department of State in the assertion that there is more espionage and subversive activity in the United States today than at any previous time in our history. Such activities are not altogether confined to aliens. Such activities are being engaged in, and propaganda is being spread, by native American citizens. It has been the practice, and is the practice today, for aliens and native-born American citizens to travel back and forth between the United States and other countries which are at least jealous of the United States, or not friendly to the United States, peddling information, news, and propaganda.

Similarly, in 1918, Senator Shields, who was in charge of the original bill, stated (56 Cong. Rec. 6194), "In order to have the protection that this country needs we must have a law applicable to all countries and to all peoples" and [56 Cong. Rec. 6195] "The great foreign population, many of whom are from the very countries with which we are at war complicates the situation seriously, and we must resort to drastic measures."

Congress was giving the Executive the tools to prevent disloyal persons from shuttling back and forth between this country and their foreign contacts. It thus appears that not only the language of the Act, as it has been consistently construed, but its entire purpose supports the position of the courts below that it was intended to apply to resident aliens.[11]

B. *The fact that the petitioner's trip was made as a crew member of an American merchant vessel and therefore did not interrupt his residence for naturalization purposes did not remove his entry from the scope of the Act and Regulations.*

The petitioner is far from clear as to what effect he claims Section 307(d)(2) of the Nationality Act of 1940 (8 U.S.C. 707(d)(2)) has on his rights (Pet. Br. 5, 17). This subsection merely provides

[11] The only other decisions involving the application of 8 C.F.R. 175.57 to returning aliens are in accord with the decision below. *Ex parte Van Laeken*, 81 F. Supp. 79 (N.D. Calif.); *Van Laeken* v. *Wixon*, 84 F. Supp. 958 (N.D. Calif.); *United States ex rel. Johns* v. *Shaughnessy*, S.D.N.Y., Civ. No. 53-49 (Dec. 5, 1949, unreported).

that under certain circumstances service as a seaman on a vessel of American registry shall be counted as part of an alien's residence for the purpose of naturalization.[12] Certainly the fact that the residence requirements of the Nationality Act have been tailored to meet the habits of alien seamen does not really have any connection with the operation or construction of the Passport Act. It cannot be held to be a partial repeal, since the present version of the Passport Act dates back to 1941, whereas the provision in question in the Nationality Act was adopted in 1940. At most, the Nationality Act could be held to be helpful in construing the meaning of "entry" in the Passport Act. But, residence for the purpose of nationality is based on domicile rather than on continuous physical presence.[13] There may be many arrivals

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[12] 54 Stat. 1142, 8 U.S.C. 707: "(d) The following shall be regarded as residence within the United States within the meaning of this chapter [Chapter III of the Act entitled "Nationality Through Naturalization"]

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"(2) Continuous service by a seaman on a vessel or vessels whose home port is in the United States and which are of American registry or American owned, if rendered subsequent to the applicant's lawful entry into the United States for permanent residence and immediately preceding the date of naturalization."

[13] Section 307(b) of the 1940 Act (8 U.S.C. 707(b)) by implication provides that absences of six months or less shall not interrupt the "continuous residence" requirement while absences of more than six months shall be presumed to break the continuity. Similar provisions are included in the 1952 Act. (Pub. Law 414, 82d Cong., 2d sess., Section 316 (b) and (c)). For a history of the statutes and their interpretation with respect to residence as used in the naturalization law, see *In re Hilden*, 60 F. Supp. 845 (S.D. N.Y.). See also *Neuberger v. United States*, 13 F. 2d 541 (C.A. 2).

and departures during the period of residence, so that the statute is not useful in construing language dealing with the *entry* of aliens.

A similar argument that there was no "entry" because of service on an American ship was met in *United States ex rel. Stopfy* v. *Corsi*, 287 U. S. 129, 133, where this Court stated, "The argument, in substance based upon the theory that an American vessel is American soil, was effectively answered, as respects the requirements of the Immigration Acts, in the *Claussen* case." In neither the *Corsi* case nor the *Claussen* case does it specifically appear whether the alien had gone ashore in the foreign ports, nor was it indicated that such circumstances would be considered material. However, in *United States ex rel. Roovers* v. *Kessler*, 90 F. 2d 327 (C.A. 5), and in *McCandless* v. *United States ex rel. Pantoja*, 44 F. 2d 786 (C.A. 3), it affirmatively appeared that the alien had not gone ashore at any foreign port visited by the ship, and it was still held that his return from the voyage constituted an entry.

C. *The regulation pursuant to which the Attorney General denied the petitioner entry without a hearing is authorized by the Act as "reasonable."*

The Passport Act authorized the President to prescribe "reasonable rules, regulations, and orders." Appendix, *infra*, p. 40. The particular regulation here involved is 8 C.F.R. 175.57, which authorizes the Attorney General to exclude an alien without a hearing if he finds that the alien's entry

would be prejudicial to the interests of the United States and that the disclosure of confidential information leading to that conclusion would be prejudicial to the public interest. Appendix, *infra*, p. 52.

Only the briefest of arguments need be advanced on whether this regulation is authorized as reasonable since that very issue was decided by this Court in *Knauff* v. *Shaughnessy*, 338 U. S. 537, 544.

The regulation, it must be borne in mind, is not applicable in normal times; it comes into effect only when the President has found that additional restrictions on departures and entries are essential to protect the national interest. Thus, the reasonableness of the regulation dispensing with hearings must be judged in the light of the evils which may come to the nation through the attempts of its enemies to learn its secrets, destroy its production, and subvert its citizens in times of emergency. It is obviously necessary to maintain secrecy as to our sources of information concerning these attempts, since, otherwise, the safety of our agents would be imperiled and their usefulness impaired. Indeed, if hearings were required in all cases, the administration would face the undesirable choice either of permitting the dangerous alien to enter or of losing a source of information whereby it could prevent other aliens from entering.

In the *Knauff* case it was held that, as applied to a war bride and in view of the national emergency of World War II, the power to exclude without a hearing was reasonable. In this case instead of a war bride, we have a seaman; instead of the emer-

gency of World War II, we have the emergency brought about by the menace of communist aggression in Korea and elsewhere as proclaimed by the President on December 16, 1950. Proclamation No. 2914, 3 C.F.R., 1950 Supp., p. 71. There can be little question that seamen who travel freely about the world, with frequent entries and departures from the United States, may be useful agents for foreign nations.[14] Nor can there be doubt that espionage and subversion are elements in the present emergency. Therefore, the reasonableness of the application of the regulation here is at least as clear as it was in the *Knauff* case.

The answer to the question of whether the regulation is authorized by the statute is, of course, dependent upon ascertaining the Congressional intent. In this respect it may be noted that the provisions of the Passport Act, and therefore of the regulations under it, were specifically extended by Congress in 1952, the latest extension being adopted in July of this year. 66 Stat. 330, Appendix, *infra*, p. 42. This action was taken subsequent to the many, varied, and well-publicized proceedings in the case

[14] Admiral R. H. Hillenkoetter, then Director of Central Intelligence, wrote to the Chairman of the Senate Judiciary Committee in 1949, that one of the elements of a typical pattern of subversive activity is (Hearings before Senate Subcommittee on Immigration and Naturalization of the Committee on the Judiciary, on S. 1832, 81st Cong., 1st Sess., Part 1, p. 359): "Arrangement of communications facilities through which agents can make their reports either to Soviet or satellite diplomatic installations within the country, or directly to the homeland. In this connection, reports have been received of attempts of these officials to organize Communist Party cells among seamen serving on vessels sailing to the homeland. These seamen are then utilized as couriers."

of Ellen Knauff, of which one aspect only was before this Court in *Knauff* v. *Shaughnessy*, 338 U. S. 537. Among the other steps taken in her case were hearings before the House Judiciary Committee and the introduction and passage in the House of several special bills looking to her relief. The extent of public interest is somewhat reflected by the fact that the New York Times carried 29 separate news stories on the matter in 1950, and 18 in 1951. See New York Times Index, 1950, p. 953; 1951, p. 921. Thus, when Congress extended the Act and regulations in 1952, there was undoubtedly, in fact, as well as in theory, congressional knowledge of the particular regulations which are here in issue. The extension of the legislation, therefore, can readily be interpreted as congressional approval of the regulation in question.

## II

### The Exclusion of the Petitioner Without a Hearing Did Not, Under the Circumstances, Violate Due Process

The petitioner's argument is that an alien who has established a domicile in this country has somehow acquired a vested right, so that even if he temporarily leaves the country the domiciliary status continues to give him rights protected by the Constitution, among which petitioner asserts is a right to a hearing. The basis of this argument disappears if it is established that even long-time residence by an alien does not give him any vested right to remain and that any procedural rights he has are dependent upon his presence and are surrendered when he voluntarily leaves the country. And this is the law.

We start from the basic proposition, which we do not understand is here in dispute, that, as an attribute of its external sovereignty, the United States, acting through Congress and the Executive departments, may exclude or deport any or all aliens, designating those to be turned away or expelled in terms of race, activity, character, mentality, prior affiliation, or otherwise, and may admit them or permit them to remain on such terms and conditions as it undertakes to prescribe. *Carlson* v. *Landon*, 342 U.S. 524, 534, 536; *Knauff* v. *Shaughnessy*, *supra*, 338 U.S. at 542; *United States ex rel. Volpe* v. *Smith*, 289 U.S. 422, 425; *Low Wah Suey* v. *Backus*, 225 U. S. 460, 467-468; *Oceanic Navigation Co.* v. *Stranahan*, 214 U.S. 320, 339-340; *Turner* v. *Williams*, 194 U.S. 279, 289-290; *The Japanese Immigrant Case*, 189 U.S. 86, 97; *Wong Wing* v. *United States*, 163 U.S. 228, 237; *Fong Yue Ting* v. *United States*, 149 U.S. 698, 704-713; *Nishimura Ekiu* v. *United States*, 142 U.S. 651, 659; *The Chinese Exclusion Case*, 130 U.S. 581, 603-604. "[O]ver no conceivable subject is the legislative power of Congress more complete" (214 U.S. at 339). The power to exclude aliens is a fundamental sovereign power, necessary to maintain normal international relations and to defend the nation against foreign encroachment and dangers. As an attribute of external sovereignty, the power passed directly to the Union from Great Britain, and is to be exercised by the political departments of the Government. *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304, 315-322. Without it the country would

not be a complete sovereign. *Fong Yue Ting* v. *United States, supra,* at 713; *The Chinese Exclusion Case, supra,* at 606-609; *Knauff* v. *Shaughnessy, supra,* at 542; *Harisiades* v. *Shaughnessy,* 342 U.S. 580, 588, 591.

It is equally well established that even long-established and legal residence gives an alien no vested right to remain, and that, despite the severity of uprooting an alien from the land which has in fact become his home and the home of his family, the power to do so remains. *Harisiades* v. *Shaughnessy,* 342 U.S. 580. Moreover, this application of the power to exclude has always been held applicable to resident aliens who have established domicile here and have left the country only temporarily. *The Chinese Exclusion Case,* 130 U.S. 581.

This, too, petitioner does not dispute, but argues that although the substantive rights of resident aliens may be assimilated to those of immigrant aliens, still procedural due process is due them; or specifically, that resident aliens seeking reentry are entitled to a fair hearing on the issue of whether they should be excluded (Pet. Br. 8). Petitioner relies on the well-established doctrine that an alien who is actually in this country, whether he entered legally or illegally, is under the mantle of the Constitution, and hence that proceedings against him are subject to due process limitations. *Fong Yue Ting* v. *United States,* 149 U.S. 698, *The Japanese Immigrant Case,* 189 U.S. 86. But petitioner loses sight of the fact that to invoke that doctrine, an alien must be within the protection of the Consti-

tution, and that his right to do so depends, not on domicile or residence here, but on physical presence. This was recently explained by this Court in *Johnson* v. *Eisentrager*, 339 U.S. 763, where the Court said at pp. 770-771:

> The alien, to whom the United States has been traditionally hospitable, has been accorded a generous and ascending scale of rights as he increases his identity with our society. Mere lawful presence in the country creates an implied assurance of safe conduct and gives him certain rights; they become more extensive and secure when he makes preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization. During his probationary residence, this Court has steadily enlarged his right against Executive deportation except upon full and fair hearing. *The Japanese Immigrant Case*, 189 U.S. 86; *Low Wah Suey* v. *Backus*, 225 U.S. 460; *Tisi* v. *Tod*, 264 U.S. 131; *United States ex rel Vajtauer* v. *Comm'r*, 273 U.S. 103; *Bridges* v. *Wixon*, 326 U.S. 135; *Wong Yang Sung* v. *McGrath*, 339 U.S. 33. And, at least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties—such as the due process of law of the Fourteenth Amendment. *Yick Wo* v. *Hopkins*, 118 U.S. 356.
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> But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that

gave the Judiciary power to act. In the pioneer case of *Yick Wo* v. *Hopkins*, the Court said of the Fourteenth Amendment, "These provisions are universal in their application, *to all persons within the territorial jurisdiction*, without regard to any differences of race, of color, or of nationality; . . ." (Italics supplied.) 118 U.S. 356, 369. And in *The Japanese Immigrant Case*, the Court held its processes available to "an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here." 189 U.S. 86, 101.

An alien who leaves the United States, even for a short period, leaves the protection of the Constitution. Not only are such aliens entitled to the protection and subject to the jurisdiction of the country of their nativity (*Harisiades* v. *Shaughnessy*, *supra*, 342 U.S. at 587), but they are also subject to the jurisdiction of any country in which they are present. Obviously, the right of either of those countries to the allegiance of the alien is paramount to that of the country which bases its claim on the tenuous doctrine of domicile. It is a part of our legal tradition that the protections of the Constitution do not extend to aliens who are beyond the territorial jurisdiction of the United States. *Johnson* v. *Eisentrager*, 339 U.S. 763, 771; *Lem Moon Sing* v. *United States*, 158 U.S. 538, 547-548; *Turner* v. *Williams*, 194 U.S. 279, 292; cf. *Yick Wo* v. *Hopkins*, 118 U.S. 356, 369; *The Japanese Immi-*

*Brant Case*, 189 U.S. 86, 101.[15] Hence, an alien who has left the United States is as much outside the protection of the Constitution as an alien who has never been here. And when a resident alien seeks to return to the United States, he is in no better position to claim the protection of the Constitution than an alien who is seeking to enter for the first time. He cannot claim the rights that flow from citizenship and he cannot claim the rights that flow from physical presence within the territory to which the Constitution extends.

For that reason, the due process clause of the Fifth Amendment is no more applicable to an alien who seeks to return than it is to an alien who seeks to enter for the first time. This, too, has been specifically held by this Court with respect to a resident alien seeking to reenter after a temporary visit abroad, in the case of *Lem Moon Sing v. United States*, 158 U.S. 538. In this case the Court said at pages 547-548:

> The power of Congress to exclude aliens altogether from the United States, or to prescribe the terms and conditions upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers, without judicial intervention, is settled by our previous adjudications. Is a statute passed in

[15] "Congress has directed the President to exert the full diplomatic and political power of the United States on behalf of any citizen, but of no other, in jeopardy abroad" (*Johnson v. Eisentrager*, 339 U.S. 763, 770).

execution of that power any less applicable to an alien, who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to reenter it? We think not. * * * He is none the less an alien because of his having a commercial domicil in this country. While he lawfully remains here he is entitled to the benefit of the guaranties of life, liberty, and property, secured by the Constitution to all persons, of whatever race, within the jurisdiction of the United States. His personal rights when he is in this country and such of his property as is here during his absence, are as fully protected by the supreme law of the land as if he were a native or naturalized citizen of the United States. But when he has voluntarily gone from the country, and is beyond its jurisdiction, being an alien, he cannot reenter the United States in violation of the will of the government as expressed in enactments of the law-making power. He cannot, by reason merely of his domicil in the United States for purposes of business, demand that his claim to reenter this country by virtue of some statute or treaty, shall be determined ultimately, if not in the first instance, by the courts of the United States, rather than exclusively and finally, in every instance, by executive officers charged by an act of Congress with the duty of executing the will of the political department of the government

in respect of a matter wholly political in its character. He left the country subject to the exercise by Congress of every power it possessed under the Constitution.

The petitioner apparently confuses the situation where an alien is being deported with that where an alien is being denied the right of entry. In deportation cases, the alien is, of course, physically present in the country and therefore entitled to a hearing. In the exclusion cases, on the other hand the alien is stopped at the border, and is therefore not within the jurisdiction. And this is so even though for purposes of convenience the alien has been permitted to remain either at a detention station or at liberty on bond. *Kaplan* v. *Tod*, 267 U. S. 228, 230; *Chin Yow* v. *United States*, 208 U. S. 8, 12; *United States* v. *Ju Toy*, 198 U. S. 253, 263; *Nishimura Ekiu* v. *United States*, 142 U. S. 651, 661; *Knauff* v. *Shaughnessy*, 338 U. S. 537, 543.

This Court has consistently held that a hearing is not constitutionally required in the case of an alien approaching these shores for the first time. This was stated long ago in *Nishimura Ekiu* v. *United States*, 142 U. S. 651, and was, of course, the heart of the decision in *Knauff* v. *Shaughnessy*, 338 U. S. 537. An alien may be excluded for any reason Congress deems fit and under any procedure established by Congress.

All that is left is to consider whether this particular petitioner has, for any reason, acquired

constitutional rights beyond those of the ordinary resident alien who temporarily makes a visit abroad.

First, did the proceeding in 1949, under which petitioner was accepted for permanent residence, give him any vested right to remain? Obviously, the only purpose and effect of that proceeding was to suspend deportation and place him in the same position as aliens who had entered legally (8 U.S.C., Supp. V, 155(c)). As far back as *The Chinese Exclusion Case*, 130 U. S. 581, and *Lem Moon Sing* v. *United States*, 158 U. S. 538, the legality of the prior residence was held immaterial. The petitioner, therefore, did not gain any additional rights by merely eliminating the illegality of his original entrance.

Second, does the fact that petitioner has made application for citizenship give him rights different from those of other aliens? This particular problem was passed upon by this Court in *United States ex rel. Klaussen* v. *Day*, 279 U. S. 398, where the Court stated at 400-401, "The provision extends to all aliens, that is, every person not a native-born or naturalized citizen. * * * His declared purpose to naturalize does not serve him here as he had not become a citizen. If his landing at Boston in 1918 was an entry he is rightly held."

Third, did the fact that petitioner had been screened by the Coast Guard and found to be a suitable person to be employed on an American merchant vessel give him a right to reentry which

other aliens did not possess? The authority to examine into the loyalty of seamen is found in 50 U.S.C. 191, implemented by Coast Guard regulations appearing in 33 C. F. R., 1950 Supp., Ch. I, Subchapters K and L. Their purpose is to protect our vessels and waterfront facilities. It is obvious that this purpose is something different and apart from the policies involved in admitting and excluding aliens under the immigration law or the passport law. But even assuming that the approval given by the Coast Guard was the equivalent of a reentry permit, it is clear that such a permit is revocable and gives the alien no vested right to reenter. *Hee Fuk Yuen* v. *White*, 273 Fed. 10 (C.A. 9), certiorari denied *sub nom. Pang Hing* v. *White*, 257 U. S. 639; *Hom Yuen* v. *United States*, 214 Fed. 57 (C.A. 2); *Nagle* v. *Lim Foon*, 48 F. 2d 51 (C.A. 9); *United States ex rel. Roovers* v. *Kessler, supra*, 90 F. 2d 327 (C.A. 5).

Fourth, does the fact that petitioner, while out of the country, was in the service of a merchant vessel of the United States give him additional constitutional rights? The cases discussed at pages 18 to 20 and at page 25, *supra*, which consistently hold that an alien seaman on an American vessel "enters" the United States within the meaning of the immigration laws, are inconsistent with any such argument. Assuming that Congress could extend such additional rights to alien seamen, it has not chosen to do so.

In the foregoing argument it has been urged that an alien seeking reentry has no ground for

complaint on due-process principles, however arbitrary the procedure followed in excluding him. This should not be taken as a concession that the denial of a hearing, in the circumstances of the current emergency and on the basis of the finding here required to be made by the Attorney General, was arbitrary or would constitute a denial of due process even if the alien could bring himself within the protection of the Constitution. There is involved here an exercise by Congress of its power to protect the Nation from threats to its security from without. Congress had to choose between the alternatives of denying particular aliens public hearings when the Attorney General should find that such hearings would lead to the disclosure of information prejudicial to the United States, and granting a hearing in such cases with the resultant impairment of the sources of information which might otherwise prevent other disloyal aliens from entering the country. Under such circumstances, the denial of a hearing falls well within the congressional power to meet emergencies. *Ludecke* v. *Watkins*, 335 U. S. 160; *Korematsu* v. *United States*, 323 U. S. 214; *Hirabayashi* v. *United States*, 320 U. S. 81; and *Hamilton v. Kentucky Distilleries Co.*, 251 U. S. 146.

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Petitioner paints a pathetic picture of the position in which he now finds himself. Indeed, exclusion is a very serious matter when an alien's home and family are located here. But so is the presence

in this country of an alien who is disloyal or worse. Then it is the welfare of a nation as a whole that is at stake. Congress and the Executive are entitled to place the national interest above that of the alien, despite the personal hardship involved. See *Harisiades* v. *Shaughnessy*, 342 U. S. 580, 586-591.

## CONCLUSION

On the basis of the foregoing discussion, it is respectfully submitted that the judgment of the court below should be affirmed.

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OCTOBER 1952.

APPENDIX

1. Section 1 of the Act of May 22, 1918, c. 81, 40 Stat. 559, as amended by the Act of June 21, 1941, c. 210, § 1, 55 Stat. 252 (22 U.S.C. 223), provides in pertinent part:

> When the United States is at war or during the existence of the national emergency proclaimed by the President on May 27, 1941, or as to aliens whenever there exists a state of war between, or among, two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this Act be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or Congress, be unlawful—
>
> (a) For any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President shall prescribe;
>
> * * * * * *

2. Public Law 313, 82d Cong., 2d sess., 66 Stat. 54, provides in pertinent part:

> Whereas the existing state of war with Japan is the last declared state of war to which the United States is a party and the termination thereof and of the national emergencies

proclaimed in 1939 and 1941 would render certain statutory provisions inoperative; and

Whereas some of these statutory provisions are needed to issue the national security and the capacity of the United States to support the United Nations in its efforts to establish and maintain world peace;

* * * * *

(a) * * * the following statutory provisions and the authorizations conferred and liabilities imposed thereby shall remain in full force and effect to and including June 1, 1952, notwithstanding any other terminal date or provision of law with respect to such statutory provisions and notwithstanding any limitation, by reference to war or national emergency, of the time during or for which authorizations or liabilities thereunder may be exercised or imposed; and acts or events of the kind giving rise to legal consequences under any of those provisions when performed or occurring during the existing state of war shall give use to the same legal consequences when they are performed or occur during the period above provided for.

* * * * *

(40) Act of May 22, 1918 (ch. 81, 40 Stat. 559), as amended by the Act of June 21, 1941 (ch. 210, 55 Stat. 252, 253; 22 U.S.C. 223-226b).

3. Public Law 368, 82d Cong., 2d sess., 66 Stat. 96, provides:

* * * (Public Law 313, Eighty-second Congress), is amended by striking out "June

1, 1952" wherever it appears * * * and inserting in lieu thereof "June 15, 1952."

4. Public Law 393, 82d Cong., 2d sess., 66 Stat. 137, provides:

* * * (Public Law 313, Eighty-second Congress), as amended, is amended by striking out "June 15, 1952" wherever it appears * * * and inserting in lieu thereof "June 30, 1952."

5. Public Law 450, 82d Cong., 2d sess., 66 Stat. 330, provides in pertinent part:

(a) The following statutory provisions, and the authorizations conferred and liabilities imposed thereby, in addition to coming into full force and effect in time of war or otherwise where their terms so provide, shall remain in full force and effect until six months after the termination of the national emergency proclaimed by the President on December 16, 1950 (Proc. 2914, 3 C.F.R., 1950 Supp., p. 71), * * * but in no event beyond April 1, 1953, notwithstanding any other terminal date or provision of law with respect to such statutory provisions, and notwithstanding any limitation, by reference to war or national emergency, of the time during or for which authorizations or liabilities thereunder may be exercised or imposed; and acts or events of the kind giving rise to legal consequences under any of those provisions when performed or occurring during the state of law which terminated on April 28, 1952, shall give rise to the same legal consequences when they are performed or occur during the period above provided for:

* * * * * *

(30) Act of May 22, 1918 (ch. 81, 40 Stat. 559), as amended by the Act of June 21, 1941 (ch. 210, 55 Stat. 252, 253; 22 U.S.C. 223-226b).

6. Public Law 414, 82d Cong., 2d sess., 66 Stat. 163, provides in pertinent part:

Sec. 215. (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, or, as to aliens, whenever there exists a state of war between or among two or more states, and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) for any alien to depart from or enter or attempt to depart from or enter the United States except under such reasonable rules, regulations, and orders, and subject to such limitations and exceptions as the President may prescribe;

* * * * *

Sec. 403. (a) The following Acts and all amendments thereto and parts of Acts and all amendments thereto are repealed:

* * * * *

(15) Act of May 22, 1918 (40 Stat. 559, 22 U.S.C. 223-226b).;

* * * * * *

Sec. 407. * * * this Act shall take effect * * * on the one hundred eightieth day immediately following the date of its enactment.*

7. Presidential Proclamation No. 2523 (6 F.R. 5821), as originally promulgated on November 14, 1941, provided in pertinent part:

WHEREAS, the act of Congress approved on May 22, 1918 (40 Stat. 559), as amended by the act of Congress approved on June 21, 1941 (* * * 55 Stat. 252) vests authority in me to impose restrictions and prohibitions in addition to those otherwise provided by law upon the departure of persons from and their entry into the United States when the United States is at war, or during the existence of the national emergency proclaimed by the President on May 27, 1941 [citing 6 F.R. 2617], or as to aliens, whenever there exists a state of war between or among two or more states, and when I find that the interests of the United States so require; and

WHEREAS, the national emergency proclaimed by me on May 27, 1941, is still existing; and

WHEREAS, there unhappily exists a state of war between or among two or more states * * *; and

WHEREAS, the exigencies of the present in-

* Enacted June 27, 1952.

ternational situation and of the national defense require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States * * *;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America, * * * do hereby find and publicly proclaim and declare that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, shall be imposed upon the departure of persons from and their entry into the United States * * *; and I make the following rules, regulations, and orders which shall remain in force and effect until otherwise ordered by me:

* * * * *

(3) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter in accordance with the rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe in execution of these rules, regulations, and orders.

No alien shall be permitted to enter the

United States if it appears to the satisfaction of the Secretary of State that such entry would be prejudicial to the interests of the United States as provided in the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State, with the concurrence of the Attorney General.

* * * * *

8. Presidential Proclamation No. 2850 (14 F.R. 5173), promulgated August 17, 1949, provides in pertinent part as follows:

* * * * *

1. The said Proclamation No. 2523 is hereby amended so that paragraph numbered (3) thereof, together with the succeeding unnumbered paragraph, shall read as follows:

(3) (a) After the effective date of the rules and regulations hereinafter authorized, no alien shall enter or attempt to enter the United States unless he is in possession of a valid unexpired permit to enter issued by the Secretary of State, or by an appropriate officer designated by the Secretary of State, or is exempted from obtaining a permit to enter, in accordance with rules and regulations which the Secretary of State, with the concurrence of the Attorney General, is hereby authorized to prescribe.

(b) No permit to enter shall be issued to an alien if it appears to the satisfaction of the issuing officer, or the Secretary of State, that the alien's entry would be prejudicial to the interests of the United States within

the meaning of the rules and regulations hereinbefore authorized to be prescribed by the Secretary of State with the concurrence of the Attorney General.

(c) Notwithstanding the provisions of the foregoing paragraphs (a) and (b), no alien applying for admission, even with a valid permit to enter, shall enter or be permitted to enter the United States if it appears to the satisfaction of the Attorney General that such entry would be prejudicial to the interests of the United States.

2. All existing regulations promulgated under or pursuant to the said Proclamation No. 2523 are hereby ratified and confirmed and shall be construed to have the same effect as if included in such proclamation * * *.

* * * * *

9. Pursuant to the authority conferred by Presidential Proclamation No. 2523, the Secretary of State, with the concurrence of the Attorney General, issued regulations (6 F.R. 5911-5918), which were from time to time amended and revised (10 F.R. 5889-5893; 10 F.R. 8995-8996, 8997-9002; 10 F.R. 15332, 15333-15335) and eventually codified, on July 30, 1947, as Part 175 of Title 8 of the Code of Federal Regulations (12 F.R. 5065, 5135-5142). These regulations provide in pertinent part (8 C.F.R. [1949 ed.], Part 175):

Part 175—Control of Persons Entering And Leaving The United States Pursuant To The Act of May 22, 1918, As Amended

* * * * *

§ 175.52 *Refusal of permission to enter.* (a) No permit to enter shall be issued to any alien if the permit-issuing authority has reason to believe that the entry of the alien would be prejudicial to the interests of the United States.

* * * * * *

§ 175.53 *Classes of aliens whose entry is deemed to be prejudicial to the public interest.* The entry of an alien who is within one of the following categories shall be deemed to be prejudicial to the interests of the United States for the purposes of §§ 175.41 to 175.62, inclusive:

(a) Any alien who belongs to one of the classes specified in the act of October 16, 1918, as amended [anarchists, opposers of organized government, advocates of violent overthrow of the United States Government, etc.]. (* * * 8 U.S.C. 137).

(b) Any alien who is a member of, affiliated with, or may be active in the United States in connection with or on behalf of, a political organization associated with or carrying out policies of any foreign government opposed to the measures adopted by the Government of the United States in the public interest, or in the interest of national defense, or in the interest of the common defense of the countries of the Western Hemisphere, or in the prosecution of the war.

(c) Any alien in possession of, or seeking to procure, unauthorized secret information concerning the plans, preparations, equipment, or establishments for the national defense of, or the prosecution of the war by, the United States.

(d) Any alien engaged in activities designed to obstruct * * * the effectiveness of the measures adopted by the Government of the United States for the defense of the United States or for the defense of any other country, or the prosecution of the war.

(e) Any alien engaged in activities designed to obstruct * * * the effectiveness of any plans made or steps taken by any country of the Western Hemisphere in the interest of the common defense of the countries of such Hemisphere.

(f) Any alien engaged in organizing, teaching, advocating, or directing any rebellion, insurrection, or violent uprising against the United States.

(g) Any alien engaged in a plot or plan to destroy materials, or sources thereof, vital to the defense of, or the prosecution of the war by, the United States, or to the effectiveness of the measures adopted by the United States for the defense of any other country.

(h) Any alien whose admission would endanger the public safety, as provided in any Executive order issued in pursuance of the act of Congress approved June 20, 1941 (* * * 55 Stat. 252 * * *).

(i) Any alien enemy [with specified exceptions].

(j) Any alien found to be, or charged with being, a war criminal * * * or an[y] alien who has been guilty of * * * conduct contrary to civilization and human decency on behalf of the Axis countries during the present World War.

(k) Any alien who is not within one or more of the classes defined in paragraphs (a) to (j), inclusive, but in whose case circumstances of a similar character may be found to exist, which render the alien's admission prejudicial to the interests of the United States, which it was the purpose of the act of June 21, 1941 (55 Stat. 252 * * *) to safeguard.

* * * * *

§ 175.57 *Entry not permitted in special cases.* (a) Any alien, even though in possession of a permit to enter, or exempted under §§ 175.41 to 175.62, inclusive, from obtaining a permit to enter, may be excluded temporarily if at the time he applies for admission at a port of entry it appears that he is or may be excludable under one of the categories set forth in § 175.53. The official excluding the alien shall immediately report the facts to the head of his department, who will communicate such report to the Secretary of State. Any alien so temporarily excluded by an official of the Department of Justice shall not be admitted and shall be excluded and deported unless the Attorney General, after consultation with the Secretary of State, is satisfied that the admission of the alien would not be preju-

dicial to the interests of the United States. Any alien so temporarily excluded by any other official shall not be admitted and shall be excluded and deported unless the Secretary of State is satisfied that the admission of the alien would not be prejudicial to the interests of the United States.

(b) In the case of an alien temporarily excluded by an official of the Department of Justice on the ground that he is, or may be excludable under one or more of the categories set forth in § 175.53, no hearing by a board of special inquiry ** shall be held until after the

** Boards of special inquiry are provided for by Sections 16 and 17 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 885-887, as amended, which provide in pertinent part:

Sec. 16 [8 U.S.C., Supp. V, 152]. * * * Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. In the event of rejection by the board of special inquiry, in all cases where an appeal to the Attorney General is permitted by this Act, the alien shall be so informed and shall have the right to be represented by counsel or other adviser on such appeal. * * *

Sec. 17 [8 U.S.C. 153.] Boards of special inquiry shall be appointed by either the district director of immigration and naturalization designated by the Commissioner or by the inspector in charge at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of the law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner of Immigration and Naturalization, with the approval of the Attorney General, shall from time to time designate as qualified to serve on such boards. * * * Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before such boards shall be separate and apart from the public, but the immi-

case is reported to the Attorney General and such a hearing is directed by the Attorney General or his representative. In any special case the alien may be denied a hearing before a board of special inquiry and an appeal from the decision of that board if the Attorney General determines that he is excludable under one of the categories set forth in § 175.53 on the basis of information of a confidential nature, the disclosure of which would be prejudicial to the public interest.

* * * * *

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grant may have one friend or relative present under such regulations as may be prescribed by the Attorney General. Such boards shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decisions of any two members of the board shall prevail, but either the alien or any dissenting member of the said board may appeal * * * to the Attorney General * * *. In every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of a board of special inquiry adverse to the admission of such alien shall be final, unless reversed on appeal to the Attorney General. * * *

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